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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Emergency Petition of
Bell Atlantic-West Virginia for
Authorization to End West Virginia's
Bandwidth Crisis

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CC Docket No. 98-11

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Comments of
Intermedia Communications Inc.**

INTERMEDIA COMMUNICATIONS INC.

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**Comments of
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Intermedia Communications Inc. ("Intermedia"), by its undersigned counsel, respectfully submits its opposition to Bell Atlantic-West Virginia's ("Bell Atlantic") petition in the above-captioned docket. In its petition, Bell Atlantic asks the Commission to forbear from applying cornerstone, procompetitive provisions of the 1996 Telecommunications Act¹ so that Bell Atlantic can provide in-region interLATA services. The relief requested is unprecedented, especially since Intermedia and other competitive carriers submitted conforming bids for this contract. The Commission never has used its forbearance authority to pick winners and losers in a competitive contract bidding process, and to do so would directly contradict the forbearance provisions of the Act and the Commission's own understanding of its forbearance authority.

I. Background

On November 26, 1997, the West Virginia Network for Educational Telecomputing² ("WVNET") published a Request for Proposal ("RFP") for "dedicated Internet

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code. The 1996 Act amended the Communications Act of 1934. In these comments, Intermedia refers to the Communications Act of 1934, as amended, as the "Communications Act" or "Act."

² WVNET is the entity that supplies Internet connectivity for higher education, K-12, state government, and public libraries in West Virginia.

connectivity with multiple DS3s.”³ The RFP’s specifications required connectivity via multiple dedicated DS3s in Morgantown, WV and Charlestown, WV. The RFP also noted that bidders “must have a high-speed network backbone of DS3 speed or better nationwide with connections to at least some of the major Network Access Points (NAPs) (MAE-East, MAE-West, San Francisco NAP, Chicago NAP, New York NAP, and CIX-SMDS).”⁴

On December 19, 1997, Intermedia submitted its bid to provide DS3 dedicated Internet service to WVNET according to the specifications of the RFP.⁵ Intermedia believed it had a strong chance of winning the WVNET contract. Intermedia has a seasoned Government Sales Division, which generates over \$40 million dollars a year in revenue from contracts with various state governments.⁶ Moreover, Intermedia is the fourth largest frame relay provider in the nation, and Intermedia’s Internet services subsidiary, DIGEX, has a nationwide DS3 and greater backbone, peering relationships with major Internet providers at key exchange points, existing state government contracts, and a staff of experienced Internet professionals.⁷ In sum, upon submitting its bid, Intermedia stood ready (and continues to stand ready) to provide WVNET and the state of West Virginia the high-speed DS3 bandwidth sought in the RFP.⁸

³ WVNET RFP at 1, attached hereto as Exhibit A.

⁴ *Id.* at 3.

⁵ Intermedia Communications/DIGEX response to WVNET RFP, attached hereto as Exhibit B.

⁶ *Id.* at 2.

⁷ *Id.* at 3.

⁸ At the time of its bid, Intermedia had secured the necessary contracts to obtain dedicated DS3 transport to provide the service required by the WVNET RFP.

By letter dated January 16, 1998,⁹ Intermedia learned that WVNET awarded its contract to Bell Atlantic Internet Solutions ("BAIS"), in spite of the fact that Bell Atlantic currently is statutorily barred from providing the interLATA services necessary to satisfy WVNET's RFP. WVNET was aware of the interLATA restrictions placed on Bell Atlantic and BAIS, but nevertheless WVNET awarded the contract to BAIS, relying on BAIS' representation that it had entered a teaming arrangement with a company called ICON for the required DS3 interLATA links.¹⁰ However, to date, BAIS and ICON have been unable to fulfill their obligations under the RFP.

On July 22, 1998, Bell Atlantic-West Virginia submitted a self-styled "emergency petition" declaring that facilities did not exist to transport high-capacity digital services out of West Virginia, making the state a "digital island" cut off from interconnecting with out-of-state Internet service providers and digital service carriers. According to Bell Atlantic, this purported lack of facilities has created a crisis that can only be resolved by eliminating the restriction on Bell Atlantic's provision of in-region, interLATA services currently imposed by section 271 of the Communications Act. As Intermedia discusses below, Bell Atlantic's filing is a sham and yet another attempt by the company to circumvent its obligations under section 271.¹¹ Because

⁹ Letter from WVNET to Intermedia, attached hereto as Exhibit C.

¹⁰ Affidavit of Henry L. Blosser at ¶ 4.

¹¹ Bell Atlantic has recently attempted to obtain similar relief under section 706 of the Act. In doing so, it also asked the Commission to grant it limited interLATA relief, based on its assertion that the Internet was facing a crisis in bandwidth in interstate Internet backbones. The Commission rejected the Bell Atlantic request last week. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, and Notice of Proposed Rulemaking (rel. Aug. 7, 1998) ("*Advanced Telecommunications Order*").

the Bell Atlantic petition is demonstrably without merit, Intermedia requests that the Commission dismiss it summarily.

II. Bell Atlantic's petition is best understood as an attempt to game the regulatory process to retain the WVNET contract

While Bell Atlantic styles its petition as a request for emergency relief, the truth of the matter is that Bell Atlantic is attempting to retain a contract through manipulating the federal regulatory process. No "bandwidth famine" exists in West Virginia, as evidenced by the fact that Intermedia and several other carriers in addition to BAIS bid on the RFP to provide high-speed Internet access in West Virginia. Moreover, Intermedia today is prepared to fulfill WVNET's RFP according to the stated specifications. The Commission never has used its forbearance authority to vindicate an individual carrier's attempt to retain a specific contract, and to do so would cut against the competitive underpinnings of the Commission's forbearance authority.¹²

The service that WVNET needs is readily available to it – WVNET simply should exercise its contract remedy and select another vendor if Bell Atlantic can't perform according to WVNET's specifications. Under the terms of the RFP:

The contract is subject to the successful negotiation of terms and conditions. In the event that mutually agreeable terms cannot be reached within a reasonable period of time, [West Virginia] reserves the right to undertake negotiations with the **next most advantageous vendor** without undertaking a new procurement process.¹³

¹² 47 U.S.C. § 160(b) ("... the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services").

¹³ WVNET RFP at 6, attached hereto as Exhibit A (emphasis supplied).

In other words, if the initially selected carrier cannot perform according to the terms of the RFP, WVNET may select another vendor.

In selecting BAIS to perform the WVNET contract, WVNET relied on BAIS' representation that it had entered into a teaming relationship with ICON to obtain the interLATA services required by the contract. As affiant Henry L. Blosser, Director of WVNET, stated, "[WVNET's] award was partially based on the understanding that ICON (BAIS's Global Service Provider (GSP)) had already successfully secured DS3 facilities from IXC's for both West Virginia IAPs."¹⁴ This assumption has turned out to be incorrect, as BAIS' teaming arrangement with ICON has failed to satisfy the terms of WVNET's RFP.¹⁵ Clearly, WVNET's inability to obtain service does not reflect a "bandwidth crisis," but only the inability of BAIS to perform as it promised in its response to the RFP. Bell Atlantic should therefore inform WVNET that BAIS cannot meet the requirements of the contract, and WVNET should select a different vendor to provide the needed service. On these facts, unprecedented waivers of section 271 of the Act or reinterpretations of the existing LATA boundaries in West Virginia are not warranted and cannot be justified.

III. Under the Commission's own interpretation of its forbearance power, the Commission lacks the authority to grant Bell Atlantic the relief requested

In its petition, Bell Atlantic seeks relief under section 706 of the Act.¹⁶ In the alternative, Bell Atlantic requests that the Commission grant a limited modification of LATA

¹⁴ Affidavit of Henry L. Blosser at ¶ 4.

¹⁵ See generally, Declaration of Charles T. Edwards.

¹⁶ Pub. L. 104-104, Title VII, § 706, Feb. 8, 1996 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157.

boundaries pursuant to section 3(25)(B) of the Act.¹⁷ Additionally, the *Public Notice*¹⁸ in this matter requests comment on the Commission's authority to grant the relief requested by Bell Atlantic under section 10(d) of the Act.¹⁹ Intermedia submits that the Commission's own understanding of its forbearance authority prevents the Commission from granting Bell Atlantic's request under sections 706, 3(25)(B), or 10(d).

Section 706 directs the Commission to conduct an inquiry to determine whether advanced telecommunications services are being deployed quickly enough. If the Commission determines that advanced services are not being deployed rapidly enough, then the Commission must act to remove barriers to entry. In direct contrast to assertions in Bell Atlantic's petition, section 706 "does not constitute an independent grant of forbearance authority...."²⁰ Indeed, section 706 merely "directs the Commission to use the authority granted in other provisions [of the Act], including the forbearance authority under section 10(a), to encourage the deployment of advanced services."²¹ Thus, by the Commission's own assessment, section 706 by itself provides an inadequate basis for the forbearance relief requested by Bell Atlantic.

Section 3(25)(B) of the Act, unlike section 706, provides the Commission with substantive authority to modify interLATA boundaries. In the past, the Commission has modified LATA boundaries pursuant to section 3(25)(B) in cases where the requested

¹⁷ 47 U.S.C. § 153(25)(B).

¹⁸ *Public Notice*, DA 98-1504 (rel. Jul. 28, 1998).

¹⁹ 47 U.S.C. § 160(d).

²⁰ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, and Notice of Proposed Rulemaking at ¶ 69 (rel. Aug. 7, 1998) ("*Advanced Telecommunications Order*").

²¹ *Id.*

modification: (1) has been approved by the relevant state commission; (2) proposes only traditional POTS service; (3) demonstrates that the state commission found a sufficient community of interest to warrant the boundary waiver; (4) documents through surveys and other means that a “community of interest” exists; and (5) involves a limited number of customers or access lines.²² Bell Atlantic has made no such showing and cannot do so as its petition relates to advanced data services, not traditional POTS service.

Moreover, the relief requested would not simply “modify” LATA boundaries in West Virginia, but would effectively eliminate such boundaries. As the Supreme Court has noted, the Commission’s authority to modify portions of the Communications Act means “moderate change” and not “basic and fundamental changes in the scheme created by [statute].”²³ The Commission’s ability to modify a statutory requirement does not give the Commission license to embrace a “wholesale abandonment or elimination of a requirement.”²⁴

In this case, Bell Atlantic asks the Commission to eliminate LATA boundaries – and by extension section 271’s interLATA prohibition – in West Virginia for advanced services so that Bell Atlantic can retain a contract that competitive carriers otherwise would fulfill. Such relief would decidedly “eviscerate section 271 and circumvent the procompetitive incentives for opening the local market to competition Congress sought to achieve in enacting section 271 of the Act.”²⁵ It follows, therefore, that the Commission should reject any Bell Atlantic effort to

²² *Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations*, Memorandum Opinion and Order, CC Docket No 96-159, FCC 97-244 at ¶ 24 (rel. July 15, 1997).

²³ *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 225 (1994).

²⁴ *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1192 (DC Cir. 1985).

²⁵ *Advanced Telecommunications Order* at ¶ 82.

obtain interLATA relief pursuant to section 3(25)(B) as an attempt to circumvent section 271 of the Act.

Section 10 of the Act provides the Commission with its substantive forbearance authority. The express language of section 10(d), however, states the Commission “may not forbear from applying the requirements of section 251(c) or section 271 ... until such sections have been fully implemented.”²⁶ In commenting on its authority to forbear from applying sections 251(c) and 271, the Commission has noted, “Congress did not provide us with the statutory authority to forbear from these critical market-opening provisions of the Act until their requirements have been fully implemented.”²⁷

Bell Atlantic does not contend that it has satisfied either its section 251(c) unbundling obligation or the competitive checklist contained in section 271, yet Bell Atlantic seeks Commission forbearance so that Bell Atlantic may retain a contract that competitive carriers otherwise would satisfy. Clearly then, Bell Atlantic is attempting to use the regulatory process and the Commission’s forbearance authority to circumvent section 271. But as the Commission has noted, erasing LATA boundaries for data services “would be functionally the same as forbearing from section 271 for advanced services and would eviscerate section 271 for those services.”²⁸ Thus, even if forbearance were an appropriate remedy for Bell Atlantic’s complaint, the Commission’s section 10 forbearance authority does not permit it to take the action requested by Bell Atlantic.

²⁶ 47 U.S.C. § 160(d).


²⁷ *Advanced Telecommunications Order* at ¶ 12.

²⁸ *Id.* at ¶ 18.

IV. Conclusion

Intermedia understands the Commission's responsibility and desire to ensure that all areas of the nation have access to advanced telecommunications services. Intermedia has supported the efforts of the Association for Local Telecommunications Services to use section 706 to open bottleneck local exchange networks so that competitive carriers will have a means of bringing advanced services to consumers. However, in this instance, the Commission's forbearance authority – be it through sections 3(25), 10, or 706 – is not implicated. Rather, the issue at hand is one of government contracts, and thus a government contract remedy should resolve this issue. By the terms of the RFP, WVNET has the authority to select another vendor to satisfy WVNET's communications needs, and if Bell Atlantic cannot perform as promised, WVNET should select Intermedia or one of the other bidding carriers to provide the bandwidth needed.

Respectfully submitted,


By: Jonathan E. Canis
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Telephone: (202) 955-9664
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August 10, 1998

A

Request for Bids

WVNET

837 Chestnut Ridge Road
Morgantown, WV 26505

Direct all inquiries regarding this order to: (304) 293-5192



Bid # **26181**

Vendor

Phone:

Fax:

Sealed bids for furnishing the supplies, equipment, services or printing described below will be received by the Institution. TO RECEIVE CONSIDERATION FOR AWARD, THE BID WILL BE SUBMITTED ON THIS FORM IN ORIGINAL AND ONE(1) COPY, SIGNED IN FULL, IN INK, AND RECEIVED IN THE PURCHASING DEPARTMENT TO HAVE A DATE/TIME STAMP AFFIXED, ON OR BEFORE THE DATE AND TIME SHOWN FOR THE BID OPENING. Prices will be based on units specified. Bidders will enter the delivery date or time for each item contained herein. The Institution reserves the right to accept or reject bids on each item separately or as a whole, to reject any or all bids, to waive informalities or irregularities and to contract as best interest of the Institution may require.

BIDS ARE SUBJECT TO THE GENERAL TERMS AND CONDITIONS AS PRINTED ON THE REVERSE SIDE HEREOF AND AS SET FORTH HEREIN.

DATE 11/26/97	DELIVERY IS REQUIRED NO LATER THAN	DEPARTMENT REQUISITION NO.	BIDS OPEN AT: 3:00 P.M. Friday, December 12, 1997	BIDDER MUST ENTER DELIVERY DATE FOR EACH ITEM BID
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Item #	Quantity	Description	Unit Price	Extended Price
		<p align="center">Request for Proposals</p> <p>The objective of this RFP is to establish a contract with a vendor for one to five years to supply all parts and labor for dedicated Internet connectivity with multiple DS3s; per the attached specifications.</p> <p>Contract to commence upon approval, as to form, by the Attorney General's Office for one year; with options to renew for 4 additional one-year periods.</p> <p>Vendor must be registered with the State of West Virginia before contract is issued.</p> <p>Bid responses are due by 3:00pm, Friday, December 12, 1997.</p> <p>Vendor must submit 1 original and 1 copy of their proposal in a sealed envelope and addressed as follows:</p> <p align="center">Procurement Services (RFP#26181) WVNET 837 Chestnut Ridge Road Morgantown, WV 26505</p>		

Total

To the Purchasing Department,
in compliance with the above, the undersigned offers and agrees, if this offer is accepted within _____ calendar days (30 calendar days unless a different period is inserted by the purchaser) from the bid open date, specified above, to furnish any or all items upon which prices are offered, at the price set opposite each item, delivered at the designated point(s), within the time specified.

Bidder guarantees shipment from _____

Bidder name _____

Via _____ within _____ days

By _____

FOB _____ after receipt of order at address shown.

Street Address _____

TERMS _____

City and State _____

Date _____ 19____ Phone _____

INSTRUCTIONS TO BIDDERS
(purchases greater than \$15,000)

1. **BIDDER'S REPRESENTATIONS:** The bidder, by making a bid, represents that: 1a) ~~the bidder has read and understands the bidding documents, terms and conditions, and the bid is made in accordance therewith;~~ and (b) ~~the bid is based upon the materials, equipment, systems, printing and/or services specified.~~
2. **QUALITY STANDARDS:** Brand names, when identified, include the standard of quality, performance or use desired. Unless otherwise noted, bids by bidders on equivalents may be considered, provided the bidder furnishes descriptive literature and other proof required by the Buyer. Samples, when required, must be furnished free of charge, including freight. In the event the Buyer elects to contract for a brand purported to be an equivalent by the bidder, the acceptance of the item will be conditioned on the Buyer's inspection and testing after receipt. If, in the sole judgment of the Buyer, the item is determined not to be equivalent, the item will be returned at the Seller's expense and the contract terminated.
3. **SUBMISSION OF BIDS:** The bid, the bid security, if any, and other documents required to be submitted with the bid shall be enclosed in a sealed opaque envelope. The envelope shall be addressed to the party receiving the bids and shall be identified as a "Sealed Bid," and shall include the bid number, the bid opening time, and the bid opening date. Bids shall be delivered and deposited at the designated location prior to the time and date for receipt of bids. Bids received after the time and date for the bid opening will be returned unopened. The bidder shall assume full responsibility for timely delivery at the location designated for receipt of bids. Oral, telephonic, facsimile or telegraphic bids are invalid and will not receive consideration.
4. **MODIFICATION OR WITHDRAWAL OF BIDS:** Prior to the time and date designated for receipt of bids, a bid submitted may be modified or withdrawn by notice to the party receiving bids at the place designated for receipt of bids. Such notice shall be in writing over the signature of the bidder and shall be received prior to the designated time and date for receipt of bids. A modification shall be worded so as not to reveal the amount of the original bid.
5. **OPENING OF BIDS:** Bids shall be publicly opened and read aloud at the designated location for receipt of bids shortly after the time and date bids are due.
6. **REJECTION OF BIDS:** The Buyer shall have the right to reject any and all bids, in whole or part; to reject a bid not accompanied by a required bid security or other data required by the bidding documents; or reject a bid which is in any way incomplete or irregular.
7. **ACCEPTANCE OF BID (AWARD):** ~~It is the intent of the Buyer to award a contract to the lowest responsible and responsive bidder provided the bid does not exceed the funds available. The Buyer shall have the right to waive informalities or irregularities in a bid received and to accept the bid, which in the Buyer's judgement, is in the Buyer's own best interests. All bids are governed by the West Virginia Code and the Procedural Rules of the Governing Board having jurisdiction.~~
8. **VENDOR REGISTRATION:** Prior to any award for purchases exceeding \$15,000, the apparent successful bidder must be properly registered with the W. Va. Department of Administration, Purchasing Division, and have paid the required vendor registration fee.
9. **NON-FUNDING:** All services performed or goods delivered under State Purchase Orders/Contracts are to be continued for the term of the Purchase Order/Contract, contingent upon funds being appropriated by the Legislature or otherwise being made available. In the event funds are not appropriated or otherwise available for these services or goods, this Purchase Order/Contract becomes void and of no effect after June 30.
10. **PAYMENTS AND INTEREST ON LATE PAYMENTS:** Payment may only be made after the delivery and acceptance of goods or services. Interest may be paid for late payment in accordance with the West Virginia Code.
11. **RESIDENT VENDOR PREFERENCE:** A resident vendor preference will be granted upon written request in accordance with the West Virginia Code.
12. **TAX EXEMPTION:** The State of West Virginia, the Governing Board and its institutions are exempt from federal and state taxes and will not pay or reimburse such taxes.

p. i

WVNET

REQUEST FOR PROPOSAL #26181

PURPOSE AND BACKGROUND

WVNET seeks to establish a contract with a vendor for one to five years to supply all parts and labor for dedicated Internet connectivity with multiple DS3s. Subsequent sections of this document will list system requirements, required services, and the criteria for evaluation. WVNET reserves the right to reject any or all bids.

WVNET supplies Internet connectivity for Higher Education, K-12, State Government, and public libraries in the state of West Virginia. These organizations are connected today via a state-wide T1 frame-relay network. This network will be upgraded to an ATM network over the next few years. WVNET also supports 800 dialin modems capable of running at 56kbs. Through several computing systems ranging from an IBM CMOS processor, DEC Vax and Alpha processors, AIX processors, etc., WVNET supplies its users with E-Mail access, Web Pages, etc. WVNET currently supports 3 Class "B" IP address ranges and many Class "C" address ranges.

INSTRUCTIONS FOR BID

Questions will be accepted by fax only, **phone questions are prohibited**. Responses will be returned by fax and distributed to all bidders. **WRITTEN QUESTIONS** may be submitted until close of business on December 4, 1997.

All technical questions regarding this RFP should be FAXED to:

Jan Gross, WVNET,
FAX# (304) 293-5540

All business/RFP process questions should be FAXED to:

Jan Gross, WVNET
FAX# (304) 293-5540

Schedule of Events for RFP #26181

- | | |
|----------------------------|------------------------------|
| 1. Release of RFP | November 25, 1997 |
| 2. Bid Opening Date & Time | 3:00 p.m., December 12, 1997 |

All vendor proposals must be received at WVNET prior to 3:00 p.m. on Friday, December 12, 1997. Late bids will not be opened nor considered.

BID FORMAT

1. The format for response must be in the same format/outline as it appears in this RFP.
2. Expansive proposals are not the goal. Please keep it simple and concentrate on the content of the proposal.
3. Bids will be accepted via hand delivery, express or mail only.
4. The vendor should provide four (4) complete copies of their proposals for use in the evaluation.

Submission of Bids

Submit all sealed bids by 3:00 p.m., December 12, 1997 to:

Jan Gross
WVNET
837 Chestnut Ridge Road
Morgantown, WV 26505

Re: Sealed bid # 26181

WVNET reserves the right to enter into negotiations to further specify and structure proposed configurations, bundles and options with the apparent winner(s).

SPECIFICATIONS

Connectivity via multiple dedicated DS3s starting with a connection in Morgantown, WV and a connection in Charleston, WV.

Each site connected to a different point of presence (POP) within the provider's network for reliability and redundancy.

The provider must have a high-speed network backbone of DS3 speed or better nationwide with connections to at least some of the major Network Access Points (NAPs) (MAE-East, MAE-West, San Francisco NAP, Chicago NAP, New York NAP, and CIX-SMDS). Vendor must include the structure of their backbone and what NAPs they connect to.

The protocol used over the DS3s must be one that WVNET's Cisco router can use, such as frame-relay or Switched Multimegabit Data Service (SMDS).

As WVNET and its users own 3 Class "B" IP address ranges and many Class "C" IP address ranges, the provider must be willing to work with the agencies or companies necessary to move these address spaces to their network.

The provider must have a Network Operations Center (NOC) with 24 hours a day, 365 days a year availability with on-duty network engineers. The NOC must be reachable by an 800 phone number.

The provider must be able to supply usage statistics on a weekly and/or monthly basis.

In Morgantown, WVNET currently has a Cisco 7513 with a HSSI card and a Larscom CSU/DSU for Internet connectivity via DS3. The provider must specify whether this equipment may be used or if they require or prefer other equipment. For the Charleston location, the vendor must specify what equipment they feel is needed at a minimum and whether they will provide it or whether WVNET needs to provide it. If the vendor is providing equipment, the cost of the equipment and installation must be included in this response.

During the period of establishing Internet connectivity, the vendor must provide WVNET an engineer that will be a single point-of-contact.

The provider must be able to provide WVNET with a full news feed.

Vendor must supply a sample invoice of the monthly charges for the continued services; and a sample of the one-time fees. Vendor must agree to provide invoices to be paid in arrears in a format approved by WVNET.

EVALUATION CRITERIA

Upon receipt of each vendor's response, an evaluation team made up of representatives of WVNET will review each response, and confirm or deny compliance with the RFP mandatory requirements, procurement guidelines, and contractual obligations. The State intends to enter into an agreement with the apparent successful vendor with an initial term of 12 months, and options to renew each year for four (4) additional years. WVNET reserves the right to exercise the option of renewal.

VENDOR CAPABILITY AND STABILITY

The vendor must have at least one (1) year of experience providing, installing, integrating, and maintaining this equipment and related services, at high volume levels. All subcontractors must have at least one (1) year of experience in the services they will be providing.

Financial position of vendor; e.g. (Dun & Bradstreet Rating). Vendor must explain what percentage of their volume this contract would include and how the vendor plans to handle the volume financially.

VENDOR REFERENCES

Vendors must provide reference accounts who will attest to the quality of the products and services and to the responsiveness of your technical support personnel. Each of the points addressed below should be verifiable at a minimum of one of the reference accounts supplied in response to this RFP. Each reference account furnished must be independent of the vendor's company and have installed equipment of the same type as proposed.

Type of organization including:

Length of time in the computer/leasing business.

The primary nature of business; e.g. sales, leasing, manufacture.

Financial position of vendor; e.g. (Dun & Bradstreet Rating). Vendor should explain what percentage of their volume this contract would include and how the vendor plans to handle the volume financially.

Supply the following for at least three reference accounts with the comparable equipment and services currently installed and operating.

Name of site, contact person, and phone number.

VENDOR REGISTRATION

Every person, firm, or corporation, selling or offering to sell to WVNET, upon competitive bids or proposals, or otherwise shall file with the Director of State Purchasing Division a Vendor Registration or Disclosure Statement (WV-1), in accordance with the State of West Virginia Statute 18-26-10F and have paid the \$45 registration fee with the Director of State Purchasing Division. The form must be processed and on file before the award is made. Failure to comply with this section of the proposal will result in automatic rejection in accordance with the referenced West Virginia statutes.

Resident Vendor Preference Request

State of West Virginia Preference Certificate is attached; if applicable, this is to be completed for in-state vendor preference.

GENERAL TERMS & CONDITIONS FOR RFP# 26181

All quotations are governed by the West Virginia Code and the rules and regulations of the Higher Education Governing Boards.

Each bidder must be a registered vendor with the State of West Virginia prior to award. The vendor must also pay the registration fee.

All services performed or goods delivered under higher education purchase orders are to be continued for the term of the purchase order, contingent upon funds being appropriated by the Legislature or otherwise being made available. In the event funds are not appropriated or otherwise made available for these services or goods, this purchase order/contract becomes void and of no effect after June 30.

Payment may only be made after the delivery, testing, and acceptance of goods or services. Advance payments are disallowed.

Interest may be paid for late payment in accordance with the West Virginia Code.

Resident vendor preference shall be granted upon written request with the vendor's response according to the attached "Preference Certificate". Each successful vendor will be certified for a specific percentage (not to exceed 5%) for the sections of the Resident Vendor Preference that was qualified. This % shall be applied to all future bids under this contract, except in cases of reciprocity.

WVNET is exempt from Federal and State taxes and will not pay nor reimburse such taxes. Certificates may be requested from WVNET.

The WVNET Director of Purchasing may cancel any purchase order/contract upon 30 days written notice to the seller.

The laws of the State of West Virginia and the rules and regulations of the Higher Education Governing Boards shall govern all rights and duties under the contract.

The contract award is subject to the successful negotiation of terms and conditions. In the event that mutually agreeable terms cannot be reached within a reasonable period of time, the State reserves the right to undertake negotiations with the next most advantageous vendor without undertaking a new procurement process. The State's WV-96 is attached to demonstrate State law and guidelines that must be adhered to in any vendor contracts presented to the State for execution. Your signed, original WV-96 will expedite this process if it is included in the bid package.

This open end contract is to become effective upon approval by the Attorney General's for one year, with options to renew for four (4) successive years.

Proposals should be prepared simply and economically, providing a straightforward, concise description of the vendor's capability to satisfy the requirements of the RFP.

The vendor will bear all costs associated with the preparation and presentation of the vendor's proposal. Neither WVNET, nor the State of WV, in general, will in any way be obligated by the vendor's response to this RFP.

If the proposals contain any information that the vendor does not want disclosed to the public or used by the State for any purpose other than to evaluate the proposal, such information must be included under separate cover and clearly marked as follows:

"THIS PAGE SHALL NOT BE DISCLOSED, DUPLICATED, OR USED IN WHOLE OR IN PART FOR ANY PURPOSE OTHER THAN TO EVALUATE THIS PROPOSAL."

This restriction may only apply to information that is specifically exempted from disclosure under Article 1, Chapter 28B of the West Virginia Code. (West Virginia Freedom of Information Act)

All vendor quotations are considered F.O.B. Destination, Freight Prepaid and Allowed. If vendor must quote with shipping charges, a "not to exceed amount" must be provided.

The Director of Purchasing and Manager of Telecommunications of WVNET will work with the vendor in the administration of this contract. The successful vendor must agree to meet periodically with WVNET to discuss issues, status, problems, accounting, etc. as needed. Vendor must provide ONE KEY CONTACT PERSON to handle and resolve problems with; installation, support, and administration.

Vendor must complete the attached "Vendor Fact Sheet".

VENDOR FACT SHEET

VENDOR NAME:

VENDOR ADDRESS:

VENDOR FEIN NUMBER:

VENDOR KEY CONTACT NAME:

VENDOR KEY CONTACT PHONE:

VENDOR KEY CONTACT FAX NUMBER:

VENDOR SIGNATURE OF PROPOSAL:

_____ **DATE:** _____

AGREEMENT ADDENDUM

In the event of conflict between this addendum and the agreement, this addendum shall control:

1. **ARBITRATION**- Any references to arbitration contained in the agreement are hereby deleted. Disputes arising out of the agreement shall be presented to the West Virginia Court of Claims.
2. **HOLD HARMLESS** - Any clause requiring the Agency to indemnify or hold harmless any party is hereby deleted in its entirety.
3. **GOVERNING LAW** - The agreement shall be governed by the laws of the State of West Virginia. This provision replaces any references to any other State's governing law.
4. **TAXES** - Provisions in the agreement requiring the Agency to pay taxes are deleted. As a State entity, the Agency is exempt from Federal, State, and local taxes and will not pay taxes for any Vendor including individuals, nor will the Agency file any tax returns or reports on behalf of Vendor or any other party.
5. **PAYMENT** - Any references to prepayment are deleted. Payment will be in arrears.
6. **INTEREST**- Should the agreement include a provision for interest on late payments, the Agency agrees to pay the maximum legal rate under West Virginia law. All other references to interest or late charges are deleted.
7. **RECOUPMENT** - Any language in the agreement waiving the Agency's right to set-off, counterclaim, recoupment, or other defense is hereby deleted.
8. **FISCAL YEAR FUNDING** - Service performed under the agreement may be continued in succeeding fiscal years for the term of the agreement, contingent upon funds being appropriated by the Legislature or otherwise being available for this service. In the event funds are not appropriated or otherwise available for this service, the agreement shall terminate without penalty on June 30. After that date, the agreement becomes of no effect and is null and void. However, the Agency agrees to use its best efforts to have the amounts contemplated under the agreement included in its budget. Non-appropriation or non-funding shall not be considered an event of default.
9. **STATUTE OF LIMITATION** - Any clauses limiting the time in which the Agency may bring suit against the Vendor, lessor, individual, or any other party are deleted.
10. **SIMILAR SERVICES** - Any provisions limiting the Agency's right to obtain similar services or equipment in the event of default or non-funding during the term of the agreement are hereby deleted.
11. **ATTORNEY FEES** - The Agency recognizes an obligation to pay attorney's fees or costs only when assessed by a court of competent jurisdiction. Any other provision is invalid and considered null and void.
12. **ASSIGNMENT** - Notwithstanding any clause to the contrary, the Agency reserves the right to assign the agreement to another State of West Virginia agency, board or commission upon thirty (30) days written notice to the Vendor and Vendor shall obtain the written consent of Agency prior to assigning the agreement.
13. **LIMITATION OF LIABILITY** - The Agency, as a State entity, cannot agree to assume the potential liability of a Vendor. Accordingly, any provision limiting the Vendor's liability for direct damages or limiting the Vendor's liability under a warranty to a certain dollar amount or to the amount of the agreement is hereby deleted. In addition, any limitation is null and void to the extent that it precludes any action for injury to persons or for damages to personal property.
14. **RIGHT TO TERMINATE** - Agency shall have the right to terminate the agreement upon thirty (30) days written notice to Vendor.
15. **TERMINATION CHARGES** - Any provision requiring the Agency to pay a fixed amount or liquidated damages upon termination of the agreement is hereby deleted. The Agency may only agree to reimburse a Vendor for actual costs incurred or losses sustained during the current fiscal year due to wrongful termination by the Agency prior to the end of any current agreement term.
16. **RENEWAL** - Any reference to automatic renewal is hereby deleted. The agreement may be renewed only upon mutual written agreement of the parties.
17. **INSURANCE** - Any provision requiring the Agency to insure equipment or property of any kind and name the Vendor as beneficiary or as an additional insured is hereby deleted.
18. **RIGHT TO NOTICE** - Any provision for repossession of equipment without notice is hereby deleted. However, the Agency does recognize a right of repossession with notice.
19. **ACCELERATION** - Any reference to acceleration of payments in the event of default or non-funding is hereby deleted.
20. **AMENDMENTS** - All amendments, modifications, alterations or changes to the agreement shall be in writing and signed by both parties. No amendment, modification, alteration or change may be made to this addendum without the express written approval Of the Purchasing Division and the Attorney General.

ACCEPTED BY:
STATE OF WEST VIRGINIA

VENDOR

Spending Unit: _____

Company Name: _____

Signed: _____

Signed: _____

Title: _____

Title: _____

Date: _____

Date: _____

TERMS AND CONDITIONS

Revised 3/20/96

1. **ACCEPTANCE:** Seller shall be bound by this Order and its terms and conditions upon receipt of this Order. This Order expressly limits acceptance to the terms and conditions stated herein. Additional or different terms proposed by the Seller are objected to and are hereby rejected, unless otherwise provided for in writing by the Buyer and approved by the Attorney General.
2. **APPLICABLE LAW:** The laws of the State of West Virginia and the Procedural Rules of the Governing Board having jurisdiction shall govern all rights and duties under the Contract, including without limitation the validity of this Purchase Order/Contract.
3. **ASSIGNMENT** Neither this Order nor any monies due, or to become due hereunder, may be assigned by the Seller without the Buyer's consent.
4. **BUYER:** For the purposes of these Terms and Conditions, the "Buyer" means the institution purchasing goods and services for which a Purchase Order has been lawfully issued to the Seller.
5. **CANCELLATION:** The Buyer may cancel any Purchase Order/Contract upon 30 days written notice to the Seller.
3. **COMPLIANCE:** Seller shall comply with all federal, state and local laws, regulations and ordinances including, but not limited to, the prevailing wage rates of the W. Va. Division of Labor, if applicable.
7. **DELIVERY:** For exceptions to the delivery date as specified in the Order, the Seller shall give prior notification and obtain the approval of the Buyer. Time is of the essence of this Order and it is subject to termination by the Buyer for failure to deliver on time.
3. **DISPUTES:** Disputes arising out of the agreement shall be submitted to the West Virginia Court of Claims.
3. **HOLD HARMLESS:** The Buyer will not agree to hold the Seller or any other party harmless because such agreement is not consistent with state law.
10. **MODIFICATIONS:** This writing is the parties' final expression of intent. No modification of this Order shall be binding unless agreed to in writing by the Buyer.
11. **NON-FUNDING:** All services performed or goods delivered under this Purchase Order/Contract are to be continued for the term of the Purchase Order/Contract, contingent upon funds being appropriated by the Legislature or otherwise being made available. In the event funds are not appropriated or otherwise available for these services or goods, this Purchase Order/Contract becomes void and of no effect after June 30.
12. **ORDER NUMBERS:** Contract Order numbers or Purchase Order numbers shall be clearly shown on all acknowledgments, shipping labels, packing slips, invoices and correspondence.
13. **PAYMENTS AND INTEREST ON LATE PAYMENTS:** Payments may only be made after the delivery of goods or services. Interest may be paid on late payments in accordance with the West Virginia Code.
14. **RENEWAL:** The Contract may be renewed only upon mutual written agreement of the parties.
15. **REJECTION:** All goods or materials purchased herein are subject to approval of the Buyer. Any rejection of goods or materials resulting in nonconformity to the terms, conditions or specifications of this Order, whether held by the Buyer or returned to the Seller, will be at the Seller's risk and expense.
16. **SELLER:** For the purposes of these Terms and Conditions, the "Seller" means the vendor whose quotation, bid, proposal or expression of interest has been accepted and has received a lawfully issued Purchase Order from the Buyer.
17. **SHIPPING, PACKING, BILLING & PRICING:** Unless otherwise stated, all goods are to be shipped prepaid, FOB destination. No charges will be allowed for special handling, packing, wrapping, bags, containers, etc., unless otherwise specified. All goods or services shall be shipped on or before the date specified in this Order. Prices are those that are stated in this Order. No price increase will be accepted without written authority from the Buyer.
18. **TAXES:** The State of West Virginia (the Buyer) is exempt from Federal and State taxes and will not pay or reimburse such taxes.
19. **TERMINATION:** In the event of a breach by the Seller of any of the provisions of this contract, the Buyer reserves the right to cancel and terminate this contract forthwith upon giving written notice to the Seller. The Seller shall be liable for damages suffered by the Buyer resulting from the Seller's breach of contract.
20. **WARRANTY:** The Seller expressly warrants that the goods and/or services covered by this Order will: (a) conform to the specifications, drawings, samples or other description furnished or specified by the Buyer; (b) be merchantable and fit for the purpose intended; (c) be free and clear of all liens, claims and encumbrances of any kind; and/or (d) be free from defect in material and workmanship.

PROMPT PAYMENT ACT OF 1990 (W. VA. CODE §5A-3-54)

INSTITUTION'S RESPONSIBILITY: According to the Prompt Payment Act of 1990 (West Virginia Code §5A-3-54), any properly registered and qualified vendor who supplies services or commodities to an institution is entitled to Prompt payment upon presentation to the institution of a legitimate uncontested invoice. The institution's accounts payable function shall establish institutional procedures to ensure that vendors are paid promptly.

An institution receiving a legitimate uncontested invoice shall process the invoice within ten working days from its receipt. This means that invoices shall be processed at the institution and forwarded to the State Auditor within ten days of receipt of the vendor's legitimate and uncontested invoice. An invoice shall be deemed to have been received on the date it is marked received by the institution, or three days after the date of the postmark made by the United States Postal Service as evidenced on the envelope in which the invoice was mailed, whichever is earlier. If the invoice is received prior to delivery and acceptance of the goods and services, the invoice shall be deemed to be received on the date the goods are delivered and accepted or the services fully performed and accepted.

VENDOR'S RESPONSIBILITY: In order to receive timely payment, vendors have an obligation and responsibility to present invoices that are timely and accurate. An original of a vendor's invoice is needed for payment. The invoice must also contain identical information as shown on the purchase order or contract, such as:

- a. Vendor's name and address;
- b. Federal Employer's Identification Number(FEIN);
- c. Purchase order number;
- d. Invoice should be mailed to the proper address at the institution;
- e. Item description and number;
- f. Quantity, unit of measure and/or unit price, and extension of each item;
- g. Invoice total;
- h. Dates of order and shipment;
- i. Back orders, if any;
- j. Cancellations, if any;
- k. Credit memo, if the credit is not part of the invoice; and
- l. Invoices for services rendered must include the dates of service and be prepared according to the payment terms in the contract or purchase order.

INTEREST ON LATE PAYMENT: The Prompt Payment Act of 1990 (West Virginia Code §5A-3-54) entitles a vendor to interest on legitimate and uncontested invoices that have not been paid from the 61st day after the invoice was received until the date when the check was mailed to the vendor. The Act considers an invoice uncontested when it accurately covers the goods and services received. If the invoice is received prior to delivery and acceptance of the goods and services, the invoice shall be deemed to be received on the date the goods are delivered and accepted or the services fully performed and accepted. In order to receive payment for interest if entitled, a vendor must make a request in writing to the State Auditor and provide proof that the vendor received a check for payment of the invoice after the 60 day time limit. If the vendor is entitled to interest, the State Auditor's Office will calculate the interest and pay any amounts due.

B

WEST VIRGINIA NETWORK FOR EDUCATIONAL TELECOMMUTING



**Procurement Services
837 Chestnut Ridge Road
Morgantown, WV 26505
ATTN: Jan Gross**

**SEALED BID NO.: 26181
Date Due: December 19, 1997
Time: 3:00 p.m.**

Chris Gatch
Government Account Manager

INTERMEDIA COMMUNICATIONS INC.
Southeast Regional Office
360 Interstate N. Parkway, Suite 500 Atlanta, Ga 30339
404-720-5000 • 800-393-9029
Fax: 404-720-5125